IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1604

GLENDA KANTOR,
Petitioner,

V.

WINFIELD DUNN, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF TENNESSEE, AND LAWRENCE S. WADE, INDIVIDUALLY AND AS COMMISSIONER OF PERSONNEL OF THE STATE OF TENNESSEE, AND JANET W. ROGERS, INDIVIDUALLY AND SUPERVISOR OF SPECIAL PROGRAMS OF DEPARTMENT OF PERSONNEL OF THE STATE OF TENNESSEE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petition for Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

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CONSTITUTION AND STATUTES

The Petitioner, Glenda Kantor, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court Of Appeals For The Sixth Circuit filed February 7, 1978.

I.

OPINIONS BELOW

The order of the Sixth Circuit Court Of Appeals was not published, and is printed as Appendix A to this Petition. Likewise, the opinion of the United States District Court For The Western District Of Tennessee was not published, and is printed as Appendix B to this Petition.

II.

JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was filed on February 7, 1978.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

III.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State violated an employment applicant's rights under the Free Exercise Clause of the First Amendment of the United States Constitution by failing to make a reasonable accommodation of her Sabbath observance by making an employment test, which is a prerequisite to State employment, available to her only on her Sabbath day, or in the alternative, making the test available to her on days other than her Sabbath at a city 200 miles distant?

2. Whether the test by which a State law which restricts the Free Exercise Clause right to Sabbath observ-

may be held constitutional

ance is that such law must prevent some "grave and immediate danger" or "substantial threat" to an interest which the State may lawfully protect.

3. Whether the finding of the Court Of Appeals and the District Court is clearly erroneous that the payment of $15.00 and postal charges is great enough a burden upon the State to satisfy the State's duty of reasonable accommodation to the Petitioner's Sabbath observance.

IV.

CONSTITUTIONAL AUTHORITY

Petitioner grounds her claim upon the Free Exercise Clause of the First Amendment to the United States Constitution, and upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The First Amendment is made Appendix C to this petition, and the Fourteenth Amendment is made Appendix D to this petition.

V.

STATEMENT OF THE CASE

12 שָׁמוֹר אֶת־יוֹם הַשַּׁבָּת לְקַדְּשׁוֹ כַּאֲשֶׁר צִוְּךָ׃
13 יְדֵי אֱלֹהֶיךָ׃ שֵׁשֶׁת יָמִים תַּעֲבֹד וְעָשִׂיתָ כָּל־מְלַאכְתֶּךָ׃
14 וְיוֹם הַשְּׁבִיעִי שַׁבָּת | לַיהוָה אֱלֹהֶיךָ לֹא־תַעֲשֶׂה כָל־
מְלָאכָה אַתָּה וּבִנְךָ וּבִתֶּךָ וְעַבְדְּךָ וַאֲמָתְךָ וְשׁוֹרְךָ וַחֲמֹרֶךָ
וְכָל־בְּהֶמְתֶּךָ וְגֵרְךָ אֲשֶׁר בִּשְׁעָרֶיךָ לְמַעַן יָנוּחַ עַבְדְּךָ
וַאֲמָתְךָ כָּמוֹךָ׃

12. Observe the sabbath day to keep it holy, as the L-rd thy G-d commanded thee.
13. Six days shalt thou labour, and do all thy work;

14. but the seventh day is a sabbath unto the L-rd thy G-d, in it thou shalt not do any manner of work, thou, nor thy son, nor thy daughter, nor thy man-servant, nor thy maid-servant, nor thine ox, nor thine ass, nor any of thy cattle, nor thy stranger that is within thy gates; that thy man-servant and thy maid-servant may rest as well as thou.

DEUTERONOMY 5:12, 13, 14
(App. 36, 37)

Glenda Kantor's Sabbath observance is based upon the above-cited Biblical reference.

Original Federal jurisdiction to hear this cause was founded upon the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, 28 U.S.C. 1331, and 42 U.S.C. 1983.

Hereinafter references are made to the transcript of the trial of the cause as it appeared in the Appendix prepard for the Sixth Circuit Court Of Appeals, and references are designated as (App.).

This complaint is brought under the Free Exercise Clause of the First Amendment of the Constitution of the United States, which is made applicable to the States through the Fourteenth Amendment (App. 4).

Glenda Kantor is an Orthodox Jew, residing in Memphis, Tennessee. (App. 24) She applied to the State of Tennessee for a position as counselor with the Tennessee Department of Employment Security. (App. 22)

Thereafter, she received a postcard from the Department of Personnel advising her that she would be allowed to take the employment test on a Saturday. Mrs. Kantor would not take the test on Saturday because she was forbidden to do so by the principles of the Jewish religion. (App. 24)

Thereafter, she sought the aid of her husband, an attorney, for the purpose of requesting a test in Memphis on a day other than Saturday. (App. 24, 28, 29) Her husband, Richard Kantor, wrote the Department of Personnel to make the request. (App. 15, 20, 21, 32, 33) Mr. Kantor received two letters from Janet Rogers, stating that the Department of Personnel would not give Glenda Kantor a test in Memphis on a day other than Saturday, but that the State would allow her to take the test on any weekday in Nashville, Tennessee. (App. 31, 33)

The Court took judicial notice of the fact that Nashville, Tennessee is approximately 200 miles distant from Memphis, Tennessee; and that the drive takes approximately 3 to 3½ hours each way. (App. 16, 17)

Glenda Kantor refused to travel to Nashville for the purpose of taking the Civil Service Examination because she believed it would work a hardship and penalty on those who wished to observe their Sabbath.

Rabbi Nathan Greenblatt testified on behalf of Mrs. Kantor. Rabbi Greenblatt was qualified as a world renowned Jewish scholar and rabbinic authority by his colleague, Rabbi Rafael Grossman. (App. 34) Rabbi Greenblatt stated that Saturday is the Jewish Sabbath, and that on the Sabbath day Jews must rest, and desist from all forms of creative activity. (App. 36, 37) Rabbi Greenblatt further said that it would constitute a desecration of the Sabbath if Glenda Kantor were to travel to the testing place on a Saturday, or to apply pencil to paper, or to concentrate on the test. (App. 39, 40) The District Court found as fact that it would be a sin for Mrs. Kantor to take the examination on Saturday. (App. 15)

At trial, Robert W. Chaffin, Director of the Division of Inter-Governmental Employee Relations for the Tennessee Department of Personnel, testified. Mr. Chaffin stated that a testing center was open all week in Nashville, but the test is offered in Memphis only on Saturdays. (App. 42, 43) However, Mr. Chaffin admitted that the

State maintains a staff of monitors in Memphis for the purpose of giving tests. (App. 44, 54) Mr. Chaffin further stated that compensation paid to monitors was $20.00 for a head monitor and $15.00 for an assistant monitor. (App. 55) Furthermore, Mr. Chaffin admitted that clerical tests are given on days other than Saturday in Memphis, Tennessee. (App. 45, 48, 49)

As an excuse for refusing to give Mrs. Kantor a test on a day other than her Sabbath, Mr. Chaffin said the commissioner of personnel believed that if he gave Mrs. Kantor a test, he would have to give others a test. (App. 50)

The State of Tennessee also offered the testimony of Mrs. Janet W. Rogers, a supervisory employee of the Department of Personnel, Mrs. Rogers told the Court the procedure by which tests are delivered from the Department of Personnel in Nashville to the testing centers in other cities in Tennessee. Where there are a large number of persons tested, the tests are driven to the center by an examiner. However, if there is a smaller group to be tested, the tests can be mailed to the monitor from Nashville. (App. 59, 60) Mrs. Rogers further verified that typing and shorthand tests are given on days other than Saturday in Memphis. (App. 61)

Thereafter, on December 13, 1974, Glenda Kantor filed a complaint in the United States District Court for the Western District of Tennessee against the Governor of Tennessee, the Commissioner of Personnel, and Janet W. Rogers, a supervisory employee of the Department of Personnel. Glenda Kantor alleged that her rights had been abridged under the Free Exercise Clause of the First Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment. (App. 4-11) Glenda Kantor prayed for the Court to declare unconstitutional the administrative policy of the Tennessee Department of Personnel which prevented her from taking a test for employment on a day other than her Sabbath. In a memorandum decision dated May 27,

1976, the Honorable Bailey Brown, J., issued a decision in favor of the Defendants. (App. 15-20)

Thereafter, the Petitioner appealed to the United States Court Of Appeals For the Sixth Circuit. (App. 2) On February 7, 1978 the Sixth Circuit filed an order which found that in order to grant Petitioner a test in her city on a day other than her Sabbath it would have to bear the burden of paying $15.00 and postal charges. The Sixth Circuit further found that the burden of paying $15.00 and postal charges would be greater than is required of the State for reasonable accommodation of the Petitioner's right to observe her Sabbath under the Free Exercise Clause. (Appendix A)

Whereupon, the Petitioner petitioned for Writ Of Certiorari from the United States Supreme Court.

VI.

REASONS FOR GRANTING WRIT OF CERTIORARI

Petitioner assigns four basic reasons as justification for this Court to issue the Writ Of Certiorari.

1. The extent of accommodation to an employee's right to Sabbath observance by an employer has not yet been ruled upon by this Court in a case based upon the Free Exercise Clause.

2. There is a conflict between the test by which a law restricting the exercise of religion may be held constitutional as given in *Trans World Airlines v. Hardison*, 97 S.Ct. 2264 (1977) and as given in the earlier cases of *West Virginia State Board Of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943), *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972).

3. The issue of the Constitutional requirements of reasonable accommodation to Sabbath observance by an

employer under the Free Exercise Clause is of national importance.

4. The Petitioner is aggrieved because the finding of the Court Of Appeals and the District Court that the burden of paying $15.00 plus postal charges was a great enough burden to restrict her Sabbath observance is clearly erroneous and destroys the principle of reasonable accommodation under the Free Exercise Clause.

Petitioner's right to observe the Sabbath of her religion, and to be free from exclusion from government employment predicated upon her Sabbath observance, is based upon the Free Exercise Clause of the First Amendment to the Constitution Of The United States. The Free Exercise Clause of the First Amendment was made applicable to the States by way of the Fourteenth Amendment in the case of *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679 (1952).

The government as an employer is required to make a reasonable accommodation to the employment applicant's rights under the Free Exercise Clause. In *Trans World Airlines, Inc. v. Hardison*, 97 S.Ct. 2264 (1977), the Court found that there was a statutory duty under 42 U.S.C. 2000(e)(j) for an employer to make a reasonable accommodation. The majority opinion did not discuss the requirements of the Free Exercise Clause as to reasonable accommodation. (97 S.Ct. 2270) However, the dissenting opinion clearly indicates that the First Amendment is applicable to Sabbath observance cases, as well as 42 U.S.C. 2000(e)(j). (97 S.Ct. 2280)

In the decision of February 7, 1978, the Sixth Circuit found that requiring the State to accommodate Petitioner's Sabbath observance by giving her a test in her own city on a day other than her Sabbath would be burdensome bcause:

> Unchallenged evidence established that to administer the test on a day other than Saturday in Appellant's

city or residence would cost the State $15.00 plus postage charges. (Appendix A)

This finding is contrary to this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 97 S.Ct. 2264 (1977), which stated:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. 97 S.Ct. 2277

By any rational analysis the expense of $15.00 plus postal charges is a *de minimis* burden upon the State of Tennessee, and is in fact no burden at all.

However, Petitioner humbly submits that the test by which a State law restricting freedom of religion may be held constitutional is not whether the law would impose a *de minimis* burden. The test set out in *Trans World Airlines, Inc. v. Hardison* is in conflict with the Supreme Court's prior decisions in *West Virginia State Board Of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. (1943), *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972).

In *Hardison* the Supreme Court stated that an employer would only have to bear a *de minimis* burden to make a reasonable accommodation. If *Hardison* also applies to the requirements of the Free Exercise Clause, then the test expressed therein is in conflict with *Barnette, Sherbert, and Yoder*. In the case of *West Virginia State Board Of Education v. Yoder*, the Court set up a much stronger test in order to justify restriction of religion:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved . . . But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

> They are susceptible of restriction only to prevent grave and immediate danger to an interest which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment which finally governed this case. 63 S.Ct. 1186.

The Supreme Court further clarified its position in the case of *Wisconsin v. Yoder* with the following language:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can override legitimate claims to the Free Exercise of religion. 92 S.Ct. 1532

The Supreme Court used the same kind of emphatic and unequivocal language in the *Sherbert v. Verner* when it stated:

> Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. 83 S.Ct. 1795

Therefore, Petitioner would show that *Trans World Airlines, Inc. v. Hardison* is in conflict on the nature of the constitutional test for restriction of the religion with *West Virginia State Board Of Education v. Barnette, Sherbert v. Verner*, and *Wisconsin v. Yoder*. The *Trans World Airlines v. Hardison* test allows restriction upon a *de minimis* accommodation, but *Barnette, Sherbert*, and *Yoder* allow restriction only for the gravest threats and highest government interests.

The issue of what the Constitution requires by way of reasonable accommodation for Sabbath observance is of national importance, affecting employees of different religious backgrounds, and affecting employers all over the nation.

VII.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court Of Appeals for the Sixth Circuit.

RESPECTFULLY SUBMITTED,
/s/ Alan Bryant Chambers
/s/ Richard Kantor
Alan Bryant Chambers
Richard Kantor
Attorneys For Petitioner
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Memphis, TN 38103

CERTIFICATE OF SERVICE

I, ALAN BRYANT CHAMBERS, hereby certify that I have on May 9, 1978 served the foregoing Petition For Writ Of Certiorari upon Mr. Robert B. Littleton, Assistant Attorney General, by mailing three copies of same to him postage prepaid to 450 James Robertson Parkway, Nashville, Tennessee.

/s/ Alan Bryant Chambers

APPENDIX A

NO. 76-2165

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GLENDA KANTOR
Plaintiff-Appellant

v.

WINFIELD DUNN, LAWRENCE S. WADE and JANET W. ROGERS, individually and in their official capacities
Defendants-Appellees

O R D E R

Before: PECK, ENGEL, MERRITT, Circuit Judges.

This appeal, perfected from a judgment for the defendant-appellee, has been submitted on the record on appeal and on the briefs and oral arguments of counsel. In her complaint, appellant alleges a violation of her rights under the First and Fourteenth Amendments to the Constitution in that tests for employment by the State of Tennessee in a position to which she aspired were only given in the city of her residence on Saturdays, in which her religion as a Jew precluded her participation, or on weekdays in a city 200 miles distant. Unchallenged evidence established that to administer the test on a day other than Saturday in appellant's city of residence would cost the State $15.00, plus postal charges. In response, appellees contend that granting appellant's demand would become burdensome in light of the fact that tests for employment are annually given to approximately thirty thousand applicants for positions. The district court found that the burden placed upon the appellant was, under the facts established, minimal, and that the State established a substantial administrative and financial reason for employing its general policy, and concluded that her right to

freely exercise her religion had not been unconstitutionally infringed, and it is here concluded that these findings are not clearly erroneous. Accordingly,

IT IS ORDERED that the judgment of the district court be, and it hereby is affirmed.

Judge Merritt dissents. I agree with Judge Brown's opinion below that the State's refusal to give the test in Memphis on a day of the week other than Saturday, appellant's Holy Day, constitutes an infringement on appellant's rights under the First Amendment, however minimal it may be; but unlike the Court below, the only reason I can divine from the record for the State's refusal to give the test on another day of the week is bureaucratic stubbornness—which is not a legitimate reason, much less the kind of "compelling reason" required by the First Amendment.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk of Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GLENDA KANTOR,
Plaintiff

v. CIVIL C-74-617

WINFIELD DUNN, GOVERNOR OF
THE STATE OF TENNESSEE, et al,
Defendants

MEMORANDUM DECISION

This case is before the court after a trial without a jury and after argument of counsel. Prior to the trial, the parties hereto filed a memorandum of law in support of their positions.

Plaintiff, Mrs. Kantor, who is a resident of Memphis, applied for a civil service position with the Department of Employment Security of the State of Tennessee, and a state office in Nashville advised her that she could take the examination in Memphis on a particular Saturday. Mrs. Kantor then advised the Nashville office that she could not take the examination in Memphis on a Saturday because she was an Orthodox Jewess and that it would be contrary to her religion for her to do so. It is without dispute that such would be contrary to Mrs. Kantor's religion and indeed, in the view of her religion, it would be a sin for her to take the examination on a Saturday. The state authority then advised Mrs. Kantor that the examination in which she was interested could be administered to her in Nashville on any day, Monday through Friday, at her convenience. When it became apparent that the test would not be administered to her in Memphis other than on a Saturday, Mrs. Kantor then filed this action against various state officials, seeking damages and injunctive

relief, it being her contention that the refusal of the state to administer the test to her in Memphis on a day other than Saturday constituted a violation of her guarantee of free exercise of religion under the First Amendment as made applicable to the states by the Fourteenth Amendment.

Mrs. Kantor's reason for not wanting to go to Nashville to take the examination was that Nashville is a three hour to a three and one-half hour drive, one way, from Memphis, that it would be inconvenient and a matter of some expense for her to make the trip, and that she has two children that she does not like to leave. (Mrs. Kantor testified, however, that the job that she was seeking would require her to work five days per week for eight hours each day).

It appears that civil service examinations are regularly given in Nashville, the state capital, on Monday through Friday and are given in several outlying cities, including Memphis, periodically on Saturdays. The reason for the choice of Saturdays is twofold: in the first place, for security reasons, the state is interested in having competent and experienced monitors for the examinations, who are usually principals or teachers from schools, who are available on Saturdays; and in the second place, the substantial demand for Saturday testing comes from those who work during the period from Monday through Friday and who therefore cannot take the test on those days. Security of the examinations is important not only for reasons of fairness but also because it is very expensive for the state to prepare tests that can be validated (e.g. they must be job related under EEOC requirements) and therefore a breach of security would involve substantial additional expense to the state in preparing and having new tests validated. The state authorities have, in the past, sought money from the Legislature to open testing centers in both Knoxville and Memphis, which could then administer civil service examinations Monday through Friday in those locations, but thus far the Legislature has not appropriated the money. When large groups are taking

the tests in an outlying location, such as Memphis, the test forms are taken by a state employee from Nashville, in his own automobile, to Memphis, and they are returned to Nashville late on that same Saturday. When smaller groups are taking the test, the tests are sent out by U.S. mail under circumstances calculated to guarantee their security, so that they arrive in Memphis on the Friday before the Saturday the tests are given, and they are returned with similar mail precautions on Saturday after the tests are given. The state concedes, as a matter of fact, that it would be possible to obtain a monitor to supervise the giving of the test to Mrs. Kantor on a day other than Saturday at a relatively small additional expense, but the state authorities are concerned that if they do this for Mrs. Kantor, they will be requested and ultimately required to do so for other persons, all over the state, who had rather not come to Nashville for the test and who, for one reason or another, do not want to take the test on Saturday.

The court takes judicial knowledge of the fact, in addition to the time necessary to drive to and return from Nashville as testified to by Mrs. Kantor, that Nashville is approximately two hundred miles from Memphis, is joined with Memphis by an interstate highway, and that there are frequent bus trips and airflights between the two cities.

This case, then, presents the question whether the burden placed by the state on Mrs. Kantor's exercise of her religion, the burden being the requirement that she take the test in Nashville rather than Memphis, infringes her First Amendment right freely to exercise her religion.

Obviously, this is not a case like *Wisconsin v. Yoder*, 406 U.S. 205, in which the Supreme Court held that Wisconsin could not, consistent with the First Amendment, require Amish children, contrary to their religion, to continue school past the eighth grade. Nor is this case like *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, in which the Court held that school children

could not be required, on pain of expulsion from school for refusal to do so, to salute the flag in violation of their religious principles. In those cases, different from here, the states sought to require people to do acts in violation of their religious princples.

This case is more like *Braunfield v. Brown*, 366 U.S. 599. In that case, some Orthodox Jews attacked a Sunday closing law on the ground that their religion required them to close their business on Saturday with the result that, to their serious financial detriment, they were required to close their business two days each week. Thus they contended that their First Amendment right to free exercise of religion was unconstitutionally burdened. The Court, through Chief Justice Warren, in denying relief, said:

> "[T]he statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.
>
> • • •
>
> "[T]he statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful."
>
> 1 L.Ed 2d 566; 567-568

We recognize that in *Sherbert v. Verner*, 374 U.S. 398, the Supreme Court held that South Carolina could not constitutionally withhold unemployment benefits from a member of the Seventh-day Adventist Church who was discharged from her job because she would not, contrary to her religious beliefs, work on Saturdays and was not able to get other employment for the same reason. We further recognize that there the Court was dealing, not with a requirement that a person do some act contrary to his religion, but was dealing with, as here, a burden placed by the state on the free exercise of religion. We still further recognize that the Court held that, in this situation, the state must show a compelling interest in imposing this burden if it is to avoid First Amendment infringement. However, reading *Braunfield* and *Sherbert* together, we conclude that, in the situation presented by the instant case, the interest of the state in enforcing its policy must be balanced with the weight of the burden placed upon Mrs. Kantor's free exercise of her religion. In the view of this court, the burden placed upon Mrs. Kantor was, under the facts presented here, minimal. On the other hand, the state did show a substantial administrative and financial reason for employing its general policy. On balance, this court finds and concludes that the First Amendment right of Mrs. Kantor freely to exercise her religion has not been unconstitutionally infringed.

The Clerk will enter a final judgment for defendants.
ENTER this 27 day of May, 1976.

BAILEY BROWN,
CHIEF JUDGE

APPENDIX C

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the government for a redress of grievances.

APPENDIX D

AMENDMENT 14

§ *1. Citizenship—Due process of law—Equal protection.*—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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GLENDA KANTOR,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION AND ORDER BELOW

The unreported order of the United States Court of Appeals for the Sixth Circuit which was filed on February 7, 1978 and which affirmed the decision of the United States District Court for the Western District of Tennessee is fully set forth in Appendix A to the Petition in this case. The memorandum opinion of the United States District Court for the Western District of Tennessee is also fully set forth in Appendix B to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The respondents are dissatisfied with the presentation of the questions by petitioner; therefore, pursuant to Rule 40(3) of the Supreme Court Rules, respondents present the question as follows:

1. **Was the Court of Appeals Correct in Concluding That the Findings of the District Court Were Not Clearly Erroneous in That the District Court Found That Under the Facts Established, a Minimal Burden Was Placed Upon Petitioner by the State's Policy of Administering Examinations for Employment in the City of Petitioner's Residence Exclusively on Saturdays, While Offering the Same Examinations in Another City on Any Weekday and That the State Established a Substantial Administrative and Financial Reason for Its Policy?**

STATEMENT OF THE CASE

The petitioner omits certain facts from petitioner's statement of the case which respondents believe are material to respondents' position. In order to correct these omissions, respondents set forth the following supplemental facts. Reference to the appendix or record of this cause as they appeared before the United States Court of Appeals for the Sixth Circuit will be designated by the abbreviations A.— or R.—, respectively.

The State of Tennessee tests approximately thirty thousand (30,000) applicants for state employment each year. (R. 51).

The Tennessee Department of Personnel, which administers examinations for state employment, is a centrally located department with its offices located exclusively in Nashville, Tennessee. (A. 44). Examinations for state employment are given in eight Tennessee cities. (A. 44). These examinations are offered in Nashville, Tennessee, on Monday through Friday of each week and exclusively on Saturdays in all other cities due to the fact that facilities are not available to administer the examination through the week in cities other than Nashville. (A. 45). The one exception to the Saturday-only testing policy in cities other than Nashville is in conjunction with manual, clerical skills examinations which are administered by local offices of the Tennessee Department of Employment Security for the Tennessee Department of Personnel (A. 47).

The determination of the date, time and location of examinations is a policy determination made by the Commissioner of Personnel pursuant to statutory authority. (A. 49 and R. 60). There are several factors upon which the Department of Personnel's policy of testing only on Saturdays in cities other than Nashville is based, including the following: the availability of physical facilities and staff for administering the examinations, (A. 48); the availability of applicants to take the examination, (R. 61 and A. 59); the fact that state employees of departments other than the Department of Personnel could not administer the examinations (A. 51); security for the examinations, (R. 81); and lack of funding to establish daily testing centers in cities other than Nashville, (A. 45, 50 and R. 81). The State has refused to schedule individual tests on days other than Saturday in cities other than Nashville due to the fact that the State would have to follow the same policy in regard to all applicants at all testing centers. (R. 71)

The United States Court of Appeals for the Sixth Circuit filed an order on February 7, 1978 which affirmed the judgment of the District Court in favor of the respondents, de-

fendants below. The basis of the Court of Appeals' order was as follows:

> "The district court found that the burden placed upon appellant was, under the facts established, minimal, and that the State established a substantial administrative and financial reason for employing its general policy, and concluded that her right to freely exercise her relion had not been unconstitutionally infringed, and it is here concluded that these findings are not clearly erroneous." (App. A to Petition, pp. 15-16).

BRIEF AND ARGUMENT

Respondents take issue with the four (4) reasons assigned by petitioner as justification for this Honorable Court to issue the writ of certiorari, and respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

1. No Question of an Employer's Accommodation to an Employee's Sabbath Observance Is Presented in This Case.

Petitioner indicates in points 1 and 2 of the reasons for granting certiorari (Petition, pp. 10 and 11) that a question is presented in this case as to the extent that an employer is required to accommodate an employee's right of Sabbath observance. Respondents respectfully submit that this question is simply not presented by this case.

The undisputed facts in this case are that petitioner was an applicant for employment with the State of Tennessee, as opposed to an employee of the State. Petition pp. 7 and 8. This case does not, therefore, present any question relative to the extent that an employer is required to accommodate an employee's right of Sabbath observance. The issue decided by the District Court in this case was whether petitioner's constitutional rights were infringed by the State's policy which required petitioner, an applicant, to take an employment examination in Nashville, Tennessee on a weekday when she could not, due to religious beliefs, take the examination on a Saturday in Memphis, Tennessee. App. B to Petition, pp. 17-21.

It should be noted that this case was not instituted under 42 U.S.C. § 2000e, *et seq.* but rather under 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the United States Constitution. Petition, p. 7. 42 U.S.C. § 2000e(j) requires that an employer "reasonably accommodate . . . an employee's or prospective employee's religious observance . . ." unless such

accommodation would cause the employer "undue hardship". The "reasonable accommodation" test is, of course, a statutory standard for determining an employer's compliance with 42 U.S.C. § 2000e, *et seq*. It is not a standard for reviewing the constitutionality of an act or policy; it has not been asserted heretofore as an issue in this case; and it is clear that this case presents no question as to an employer's duty to accommodate or reasonably accommodate an employee's or prospective employee's religious observance.

2. **There Is No Conflict in the Decisions of This Court Relative to the Test for Determining Whether a Law Is Constitutional Under the Free Exercise Clause of the First Amendment.**

Citing *Trans World Airlines, Inc. v. Hardison*, — U.S. —, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), petitioner asserts that there is a conflict between the *Trans World Airlines* case and the three (3) other cases relative to the test for determining whether a law is constitutional under the Free Exercise Clause of the First Amendment to the United States Constitution. Petition, p. 10.

This Court's decision in *Trans World Airlines, Inc. v. Hardison, supra*, did not involve a determination of the constitutionality of any statute, policy, or practice. In the Court's words, the sole issue in *Trans World Airlines, supra*, was ". . . the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on Saturdays." 53 L.Ed.2d at 120. It is, therefore, rather clear that *Trans World Airlines, Inc. v. Hardison, supra*, has no application to the case at bar because, as noted

above, the case at bar presents no question under 42 U.S.C. §2000e, *et seq*.

While respondents do not concede that this Court's decisions in *West Virginia State Board of Education v. Barnett, supra*, *Sherbert v. Verner, supra*, and *Wisconsin v. Yoder, supra*, are applicable to the case at bar, respondents do contend that there is no conflict between these decisions and the Court's decision in *Trans World Airlines, Inc. v. Hardison, supra*.

3. **The District Court, as Affirmed by the Court of Appeals, Correctly Found That Petitioner's Right to Freely Exercise Her Religion Had Not Been Unconstitutionally Infringed and the Findings of Fact of the District Court Have Not Been Shown to Be Clearly Erroneous.**

The respondents take the position that the respondents' offer to administer an employment examination to petitioner in Memphis, Tennessee on a Saturday or, in the alternative, in Nashville, Tennessee on a weekday did not impose any burden on the free exercise of petitioner's religion. Although the District Court found that the State's policy did place a burden on petitioner's free exercise of her religion, the Court concluded that petitioner's right to freely exercise her religion had not been unconstitutionally infringed. App. B to Petition, p. 21. The respondents, therefore, concur with the result reached by the District Court and with the order of the Court of Appeals affirming the District Court's decision.

As the District Court noted in its memorandum opinion (App. B to Petition, pp. 19 and 20), the case at bar is not analogous to *Wisconsin v. Yoder, supra*, and *West Virginia State Board of Education v. Barnett, supra*.

In *West Virginia State Board of Education v. Barnett, supra*, this Court held that school children could not be required by the threat of expulsion from school to salute the United

States flag in violation of their religious beliefs. In *Wisconsin v. Yoder, supra*, the Court held that the state could not enforce its compulsory school attendance laws to require Amish children to attend school beyond the eighth grade in violation of their religious beliefs. In both of these cases the states sought to compel some action on the part of religious observants which violated their religious beliefs. These cases are substantially different from the case at bar where petitioner was not compelled to act in violation of her religious beliefs.

The respondents respectfully contend that petitioner's First Amendment rights were not violated under the facts of this case because the State did not compel petitioner to do any act which would violate her religious beliefs. The respondents did not compel petitioner to take the State's examination in Memphis on a Saturday or forfeit her opportunity for state employment. The respondents offered petitioner a viable and reasonable alternative and that alternative was to take the examination on any weekday in Nashville, Tennessee.

In view of the alternative available to petitioner, respondents also contend that the case *sub judice* is not like the case of *Sherbert v. Verner, supra*. In *Sherbert v. Verner* this Court held that it was a denial of First Amendment rights for a state to withhold unemployment compensation from a Seventh day Adventist because she refused to accept employment on Saturday, her Sabbath. The state action in *Sherbert, supra*, gave the appellant no alternative in that she, by the state's action, was either compelled to work on Saturday, which violated her religious beliefs, or forfeit her unemployment compensation benefits. Herein lies the difference in the *Sherbert* case and the case at bar where petitioner had available the opportunity to take the state's employment examination on a day other than Saturday in another city.

In reaching its conclusion that petitioner's right to freely exercise her religion had not been unconstitutionally infringed,

the District Court applied this Court's decisions in *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 1 L.Ed.2d 566 (1961) and *Sherbert v. Verner, supra*. App. B to Petition, p. 21. In applying these decisions and in concluding that petitioner's rights had not been unconstitutionally infringed, the District Court made the following findings of fact:

> "In the view of this court, the burden placed upon Ms. Kantor was, under the facts presented here, minimal. On the other hand, the state did show a substantial administrative and financial reason for employing its general policy." App. B to Petition, p. 21.

Respondents respectfully submit that these findings of the District Court are correct and that there has been no showing by petitioner that these findings are clearly erroneous.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses . . ."

The finding of the District Court, as affirmed by the Court of Appeals, was not ". . . that the burden of paying $15.00 plus postal charges was a great enough burden to restrict her [petitioner's] Sabbath observance . . ." Petition, p. 11. Contrary to this contention, the finding of the District Court that the respondents had shown a substantial administrative and financial reason for its policy was based upon other factual findings of the Court. See App. B to Petition, pp. 18 and 19.

The factual findings of the District Court are undisputed, and respondents respectfully submit, therefore, that there has been no showing that these findings are clearly erroneous.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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